No. 75866-2

J.M. JOHNSON, J. (dissenting)—Stephen Leyda was convicted of four counts of second degree identity theft stemming from the following incidents. On October 21, 2002, Leyda and his girlfriend used Cynthia Austin's Bon Marché credit card to purchase several items at the Bon Marché. On October 26, 2002, Leyda and his girlfriend again used Ms. Austin's card to make two separate purchases at different registers in the Bon Marché. On each of these occasions, Leyda's girlfriend signed the credit card receipt. On November 2, 2002, Leyda and his girlfriend attempted to make yet another purchase with Ms. Austin's credit card at the Bon Marché but were eventually apprehended by the police.

Leyda claims, and the majority agrees, that the trial court employed the wrong "unit of prosecution" when it convicted him of one count of identity theft for each use or attempted use of a stolen credit card. However, the plain language of the identity theft statute establishes that the legislature intended for each use to be a "unit of prosecution." Thus, I dissent.

The principles of double jeopardy protect a defendant from being convicted more than once under the same statute if the defendant commits only one unit of the crime. *State v. Tvedt*, 153 Wn.2d 705, 710, 107 P.3d 728 (2005). In order to resolve whether double jeopardy principles are violated when a defendant is convicted of multiple violations of the same statute, we must determine what unit of prosecution the legislature intends to be the punishable act under the statute. *Id.*

In determining legislative intent, we first look to the plain meaning of the statute. *State v. Ose*, 156 Wn.2d 140, 144, 124 P.3d 635 (2005). The meaning of a plain and unambiguous statute must be derived from the wording of the statute itself. *State v. Tili*, 139 Wn.2d 107, 115, 985 P.2d 365 (1999). A statute is ambiguous if it is susceptible to two or more reasonable interpretations, but it is not ambiguous merely because different interpretations are conceivable. *Id*. However, "[i]f the Legislature has failed to denote the unit of prosecution in a criminal statute, the United States Supreme Court has declared the ambiguity should be construed in favor of lenity." *State v. Adel*, 136 Wn.2d. 629, 634-35, 965 P.2d 1072 (1998) (citing *Bell v. United States*, 349 U.S. 81, 84, 75 S. Ct. 620, 99 L. Ed. 905 (1955)).

The identity theft statute provides:

> (1) No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.
>
> (2)(a) Violation of this section when the accused or an accomplice uses the victim's means of identification or financial information and obtains an aggregate total of credit, money, goods, services, or anything else of value in excess of one thousand five hundred dollars in value shall constitute identity theft in the first degree. Identity theft in the first degree is a class B felony.
>
> (b) Violation of this section when the accused or an accomplice uses the victim's means of identification or financial information and obtains an aggregate total of credit, money, goods, services, or anything else of value that is less than one thousand five hundred dollars in value, or when no credit, money, goods, services, or anything of value is obtained shall constitute identity theft in the second degree. Identity theft in the second degree is a class C felony.

Former RCW 9.35.020(1)-(2) (2001).[1]

Leyda contends that once an individual has acquired another's personal information with the intent to commit a crime, the unit of prosecution "encompasses any subsequent use of that information." Suppl. Br. of Pet'r at 5. The plain language of the statute belies Leyda's interpretation.

The statute penalizes knowingly "obtain[ing] . . . a means of identification," "possess[ing] . . . a means of identification," "us[ing] . . . a

[1] The statute has been subsequently amended but is substantively the same. *See* Laws of 2003, ch. 53, § 22.

means of identification," or "transfer[ring] a means of identification" with the intent to commit, aid, or abet any crime. Former RCW 9.35.020(1). This statute is clear and plain regarding its meaning—the statute by its terms penalizes each use, possession, transfer, or obtainment of a means of identification when the requisite intent is present.

The statute also penalizes knowingly "obtain[ing] . . . financial information," "possess[ing] . . . financial information," "us[ing] . . . financial information," or "transfer[ring] . . . financial information" with the intent to commit, aid, or abet any crime. Former RCW 9.35.020(1). The meaning here is also clear and plain—each use, possession, transfer, or obtainment of financial information is a criminal act, and thus a unit of prosecution, when the requisite intent is present.

While arguably one could "possess" financial information[2] or a means of identification[3] only once, one could use or transfer the same financial

---

[2] "Financial information" is defined as:

> [a]ny of the following information identifiable to the individual that concerns the amount and conditions of an individual's assets, liabilities, or credit:
>
> (a) Account numbers and balances;
>
> (b) Transactional information concerning an account; and
>
> (c) Codes, passwords, social security numbers, tax identification numbers,

information or means of identification many times. One could also "obtain" the same financial information or means of identification multiple times from multiple sources. For example, one might obtain the same individual's Social Security number by "dumpster diving" in that individual's trash or by "phishing" for that means of identification by sending that individual a misleading e-mail. *See* Holly K. Towle, *Identity Theft: Myths, Methods, and New Law*, 30 Rutgers Computer & Tech. L.J. 237, 248-50 (2004); Jennifer Lynch, *Identity Theft In Cyberspace: Crime Control Methods and Their Effectiveness in Combating Phishing Attacks*, 20 Berkeley Tech. L.J. 259

> driver's license or permit numbers, state identicard numbers issued by the department of licensing, and other information held for the purpose of account access or transaction initiation.

RCW 9.35.005(1).

[3] "Means of identification" is defined as:

> [i]nformation or an item that is not describing finances or credit but is personal to or identifiable with an individual or other person, including: A current or former name of the person, telephone number, an electronic address, or identifier of the individual or a member of his or her family, including the ancestor of the person; information relating to a change in name, address, telephone number, or electronic address or identifier of the individual or his or her family; a social security, driver's license, or tax identification number of the individual or a member of his or her family; and other information that could be used to identify the person, including unique biometric data.

RCW 9.35.005(3).

(2005).

Nothing in the plain language of former RCW 9.35.020(1) indicates that the legislature wanted to group all uses of a single piece of identification or information into a single criminal act. Leyda attempts to make former RCW 9.35.020(1) ambiguous by arguing that "[i]f the Legislature intended each use to constitute a unit of prosecution, the phrase 'aggregate total' [in former RCW 9.35.020(2)] is superfluous." Suppl. Br. of Pet'r at 11. However, merely because Leyda misreads sections (1) and (2) together does not make section (1) ambiguous. Section (1) by itself is plain and unambiguous. Moreover, reading sections(1) and (2) together also unambiguously identifies the unit of prosecution. Leyda's argument of ambiguity is based on a misidentification of the time period for aggregation. In fact, Leyda's contention regarding the aggregation of the value of "credit, money, goods, services, or anything else of value" actually undercuts his argument.

The statute creates the crime of identity theft in the first degree when the accused "uses the victim's means of identification or financial information and obtains an aggregate total of credit, money, goods, services, or anything

else of value in excess of one thousand five hundred dollars." Former RCW 9.35.020(2)(a). The statute does not require aggregation of all different "uses" but the aggregation of the "credit, money, goods, services, or anything else of value." In a single transaction one can obtain credit in an amount greater than $1,500, and one could obtain multiple lines of credit from a single financial institution in a single transaction. One can use financial information to purchase multiple goods or services in an amount greater than $1,500 during a single transaction. And one could obtain money or anything else of value in an amount greater than $1,500. The "aggregate total" language, far from being superfluous, serves to separate those *uses* of financial information or a means of identification in which the value obtained is greater than $1,500 from those in which the value is less than $1,500, regardless of the number of lines of credit, goods, services obtained per use.

Second degree identity theft occurs when the use of the victim's financial information or means of identification obtains less than $1,500, *or* when the use, possession, transfer, or obtaining of financial information or a means of identification does not result in obtaining anything of value. *Acquiring* the financial information or means of identification, *possessing* the

financial information or means of identification, and *transferring* financial information or means of identification with the intent to commit a crime may not be acts that result in obtaining credit, goods, services, money, or anything else of value, and would thus constitute second degree identity theft.

The plain language of the statute denotes that the legislature intended the unit of prosecution to be each individual use (or transfer, possession, or obtainment). The majority skips over the plain language and without declaring the statute ambiguous turns to legislative history. However, the legislative history further supports the plain language of the statute.

> When enacted in 1999 the identity theft statute read:
>
> > No person may knowingly use or knowingly transfer a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity harming or intending to harm the person whose identity is used, or for committing any felony.

Laws of 1999, ch. 368, § 3.

The unit of prosecution in this precursor statute was the use or transfer of a means of identification with the intent to commit a crime. It would be peculiar to interpret the legislature's *addition* of the "obtaining" or "possessing" methods of committing identity as abrogating the individual use as the unit of prosecution. The separation of the crime into two degrees

recognizes the greater harm to the victim[4] that occurs when the victim's means of identification or financial information is used to obtain greater economic benefit than the mere acquisition or transfer of such data or a lesser use.

In the present case, the unit of prosecution is each individual use of the stolen identity, i.e. the stolen credit card. The unit of prosecution is each transaction (whether it be use, possession, transfer, or obtainment). The State did not charge each *purchase* as a separate count but rather charged each transaction. The plain meaning of "use" with regard to a credit card would dictate that regardless of how many items are purchased at once, the credit card is "used" only once in each transaction.

Logically, each time a person signs a credit slip or enters a PIN (personal identification number), the credit card has been used and a single transaction has occurred (although multiple purchases may have been made). Each use is a separate chargeable offense. As noted above, the aggregation of the items purchased then determines the degree of the crime.

---

[4] "'Victim' means a person whose means of identification or financial information has been used or transferred with the intent to commit, or to aid or abet, any unlawful activity." RCW 9.35.005(5).

In sum, simply because a defendant can misread the identity theft statute does not make it ambiguous. I would hold that the unit of prosecution for identity theft is each individual use, transfer, possession, or obtainment of a means of identification or financial information. I am confident that the plain language of the statute evidences this commonsense result that the legislature intended. I would affirm Leyda's convictions. Thus, I dissent.

AUTHOR:

Justice James M. Johnson

WE CONCUR:

Justice Tom Chambers